



# PUBLIC NOTICE

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## COMMENT SOUGHT ON BENEFITS AND BURDENS OF REQUIRING COMMENTERS TO FILE CITED MATERIALS IN RULEMAKING PROCEEDINGS AS FURTHER REFORM TO ENHANCE RECORD-BASED DECISIONMAKING

GC Docket No. 10-44

**Comments Due: (30 days after publication in the Federal Register)**  
**Reply Comments Due: (45 days after publication in the Federal Register)**

In this public notice, we seek comment on additional procedures to improve transparency and efficiency in Commission proceedings. In particular, we seek comment on whether we should require commenters to file materials they cite in pleadings submitted in rulemaking proceedings, so that those materials are more easily accessible to all interested parties. Over the last two years, the Commission has honed its procedures to improve efficiency and transparency in all its operations. Significant changes were made in February 2011 when the Commission adopted two companion orders improving the Part 1 rules of practice and procedure and Part 0 rules of organization, as well as the *ex parte* rules.<sup>1</sup> As reflected in those orders, the Commission bases its decisions on record evidence, properly disclosed, with the least possible burden on filers, and strives to tailor its procedures to those ends.

For example, in the February 2011 orders the Commission increased the availability and use of electronic filing, thereby making the administrative record of Commission proceedings more quickly and fully accessible to the public.<sup>2</sup> The Commission also required that the contents of all *ex parte* contacts in permit-but-disclose proceedings be disclosed, but provided an extra business day to file *ex parte* notices to diminish the burden enhanced disclosure requirements impose on parties.<sup>3</sup> Further, the Commission addressed concerns about submissions during the Sunshine period of repose that precedes a Commission Open Meeting, by permitting limited replies to notices of *ex parte* contacts during the Sunshine period

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<sup>1</sup> *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594 (2011) (Procedures Order); *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4517 (2011) (*Ex Parte* Order).

<sup>2</sup> See Procedures Order, 26 FCC Rcd at 1595-1602, paras. 4-21 (expanding the use of dockets, requiring electronic filing whenever technically feasible, and reducing the number of paper copies that must be filed when paper filing is used); *Ex Parte* Order, 26 FCC Rcd at 4529-32, paras. 49-55 (requiring electronic filing in most circumstances).

<sup>3</sup> *Ex Parte* Order, 26 FCC Rcd at 4522-24, paras. 23-29.

and thus giving interested parties an opportunity to react to new data or arguments filed during the Sunshine period.<sup>4</sup>

Transparency, robust public participation, and informed decision-making are key values that the Commission and its staff strive to uphold in all proceedings. In some proceedings, particularly large and complicated rulemakings, staff may analyze materials that parties have not submitted in the record, including materials such as state statutes, academic articles, blog posts, and company financial reports. This material may or may not contribute to the Commission's final decision, and seeking comment specifically on all the sources viewed by staff would greatly enlarge the record and tax the time and resources of the Commission and parties, with potentially little benefit.

In an effort to balance these considerations, staff has submitted collections of materials into the record of at least two major proceedings. In the *Preserving the Open Internet* proceeding, staff added the full text of various sources including FCC working papers, transcripts from FCC workshops, comments submitted in other Commission rulemaking proceedings, public financial filings, academic literature, news articles, blog posts, corporate and non-profit research reports, material from industry participants' websites, and investment firm conference call transcripts.<sup>5</sup> In the *Connect America Fund* proceeding, staff added citations to similar materials, including material from other federal and state government entities, books, and data already released by the Commission or the Universal Service Administrative Company.<sup>6</sup> In many instances, filings that the Commission staff placed in the record had been cited by commenters in their filings, and the staff's submission was intended to make the materials more accessible.<sup>7</sup> In both proceedings, however, a small number of commenters voiced concern that such submissions, toward the end of the proceeding, might not serve their intended purpose of promoting transparent decision-making and might, indeed, limit opportunities for meaningful responsive comment.<sup>8</sup>

In light of these developments, we seek comment on filing requirements that may improve transparency and informed decision-making in future rulemaking proceedings. In particular, we seek comment on requiring parties to submit full copies of any materials cited in their pleadings or *ex parte*

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<sup>4</sup> *Id.* at 4528, para. 45.

<sup>5</sup> See Letter from Carol Simpson, Deputy Chief, Competition Policy Division, Wireline Competition Bureau, FCC, to Marlene S. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (Dec. 13, 2010); Letter from Carol Simpson, Deputy Chief, Competition Policy Division, Wireline Competition Bureau, FCC, to Marlene S. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (Dec. 10, 2010).

<sup>6</sup> See Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (Oct. 19, 2011); Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (Oct. 17, 2011); Letter from Jennifer Prime, Legal Counsel, Wireline Competition Bureau, FCC, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 *et al.* (Oct. 7, 2011).

<sup>7</sup> Materials also included such things as state statutes, pleadings and decisions from state administrative proceedings, and data and reports available on the Commission's website.

<sup>8</sup> See, e.g., Letter from Todd D. Daubert & J. Isaac Himowitz, Counsel for SoutherinLINC Wireless and the Universal Service for America Coalition, to Chairman Genachowski, WC Docket No. 10-90 *et al.*, at 3 (Oct. 21, 2011); Letter from David A. LaFuria, Counsel to Allied Wireless Communications Corp. *et al.*, WC Docket No. 10-90 *et al.* (Oct. 20, 2011); see also *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 18049-50 (2010) (dissenting Stmt. of Cmmr. McDowell), *recon. and pets. for review pending*.

submissions.<sup>9</sup> Such a requirement may be viable under the Commission's current electronic filing processes, when it would not previously have been feasible. Further, it could help to ensure that the record timely and unambiguously includes those materials that parties to our proceedings believe to be germane and informative.

What would be the benefits and burdens of such a new procedural requirement in rulemaking proceedings? Should any such rule distinguish among types of documents cited? For example, should data be treated differently from other forms of information and should economic analysis be treated differently from a law review article, court decision, or other government publication? Should ease of access to the cited information matter? If so, how should ease of access be determined? Are there some circumstances in which materials could not practically be placed in the record, such as when third parties do not permit copying (*e.g.*, daily newsletters), the material is very bulky, or the material is in the form of a database? Would parties need to place an entire document in the record or would an excerpt suffice? Should the inclusion of an Internet address (URL) where the document can be viewed be deemed sufficient to satisfy the filing requirement for that document? Might this proposal diminish the quality of the comments received by the Commission, for instance if the additional burden of providing supporting materials outweighs their perceived value to the commenter? Would this proposal impose an undue paperwork burden on filers? Should the proposal be adopted in additional, or different, categories of proceedings?

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

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<sup>9</sup> In the context of formal complaint proceedings, the Commission's rules already require parties to provide "all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies." *See* 47 C.F.R. § 1.721(f).

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

Documents will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

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For further information regarding this proceeding, contact Elizabeth Lyle, Office of General Counsel, (202) 418-1720.

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